Supreme Court, U.S.
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No. 01-107

IN THE

Supreme Court of the United States

ULYSSES I & COMPANY, INC.,

Petitioner,

v.

PETER MORTON, GARY FELDSTEIN, MARA GIBBS, THE STATE OF NEW YORK, SUFFOLK COUNTY, THE INCORPORATED VILLAGE OF EAST HAMPTON and EDWARD P. ROMAINE, as Clerk of Suffolk County,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT BRIEF IN OPPOSITION OF RESPONDENTS PETER MORTON, GARY FELDSTEIN AND MARA GIBBS

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QUESTIONS PRESENTED

1. Whether a district court has jurisdiction to determine property rights in real property contrary to a state court determination of such rights affirmed throughout the state appellate system.

2. Whether the complaint herein adequately alleged a claim under 42 U.S.C. § 1983 under well settled precedents.

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STATEMENT

This joint brief is submitted on behalf of respondents Peter Morton ("Morton"), Gary Feldstein ("Feldstein") and Mara Gibbs[1] (collectively referred to as the "Individual Defendants") in opposition to the petition of Ulysses I & Company, Inc. ("Ulysses") for a writ of certiorari to the United States Court of Appeals for the Second Circuit to review its summary order dated April 18, 2001 affirming the judgment of the United States District Court for the Eastern District of New York dismissing this action under F.R.C.P. 12(b)(1) for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine and F.R.C.P. 12(b)(6) for failure to state a claim (the "Petition") (App. A[2]). That judgment was entered pursuant to the decision of Judge Denis R. Hurley on August 1, 2001 (App. G).

STATEMENT OF THE CASE

As will be documented below, with this Petition this Court becomes the tenth court, and the fifth federal court, before which Ulysses has sought relief arising out of the issue of who is entitled to ownership of 57 West End Drive, East Hampton, New York in Suffolk County (the "Premises"). These claims were asserted in seven different actions, including four in federal courts. In all courts and all actions, Ulysses has been unsuccessful.

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1. Mara Gibbs' role in this case is an extremely limited one. She was an occasional house guest in the premises at issue. All references to Morton's participation in this case include Gibbs.

2. All references to the record are either to the appendices to the Certiorari Petition and are preceded by "App." or to the Joint Appendix in the Second Circuit and are preceded by the letter "A".

In Ulysses' characteristic style, the Statement of the Facts in its Petition, just like the dismissed amended complaint (A12-43), contains a number of misstatements and half truths. Despite Rule 15.2 of the Rules of this Court, it would be fruitless to try to correct all of these misstatements, particularly since many of the issues these misstatements and half-truths purport to raise cannot be determined in a federal district court action since they have already been decided against Ulysses by a final determination of New York Supreme Court, Suffolk County subsequently affirmed through the New York appellate system (which action will be referred to as the "Suffolk County Action"[3]).

The Premises were originally owned by Jack Rounick ("Rounick") who entered into a contract with Feldstein, the then tenant of the Premises, in which Rounick agreed to sell the Premises to Feldstein with Feldstein to remain in possession until the closing. (A44-58, including amendments). The Decision in the Suffolk County Action (App. J) has specifically held that Feldstein fully performed his contract with Rounick (App. J at J4, J6).

Despite this, on August 13, 1998, Rounick entered into a *second* contract to sell the Premises for more money, this time to Ulysses (A88-95). Significantly, the Ulysses contract and the mortgage it provides for are expressly made *subject to* Feldstein's rights (A83, 94). Foretelling its true agenda, Ulysses specifically indemnified Rounick against any court award or legal expense, including punitive damages,

3. Subsequently, on May 14,2001, Supreme Court Suffolk County granted Ulysses' motion to vacate the judgment and directed that it be resettled (App. H). That order specifically denied Ulysses' attempt to reargue the underlying grant of summary judgment in favor of Feldstein.

resulting from a suit by Feldstein or his assigns to enforce his rights (A83). On August 25, 1998, the Premises were ostensibly deeded to Ulysses by Rounick and a purchase money mortgage given to Rounick (A116-118). Ulysses, whose sole "asset" is its subsequently invalidated title to the Premises, is a corporation controlled and funded by Sheldon Solow, a prominent real estate entrepreneur with a penchant for serial litigation in persistent violation of all notions of *res judicata* and collateral estoppel (A214, 484). Using Ulysses, he was apparently looking to trade up from his own rather lackluster house to a more valuable oceanfront property by attempting to literally steal the Premises from Feldstein by purchasing it out from under him at a fraction of its value (A485).

Ulysses argued that Feldstein breached his agreements with Rounick by entering into an agreement with Morton on August 10, 1998 (A59-70) under which, in the words of the Suffolk County Decision, "Feldstein agreed that he would under certain conditions assign to Morton at the closing with Rounick all of Feldstein's rights to the property" (App. J at J4). That decision specifically held that this agreement was not itself an assignment (App. J at J4, J7), and thus no breach had occurred. This parallels a similar holding by Magistrate Judge Michael L. Orenstein in a hearing on August 10, 1999 in an earlier, dismissed Eastern District action brought by Ulysses (A217, 376-377) on the same issues.

A. The Suffolk County Action

Passing over the intermediate developments detailed in the Suffolk County Decision (App. J at J4-J5), on August 31, 1998, Feldstein sued Rounick and Ulysses in Supreme Court, Suffolk County seeking specific performance and a

declaratory judgment that his contract with Rounick was in full force and effect (A119-123). In that action Ulysses asserted four counterclaims against Feldstein seeking, *inter alia*, a declaration that it was the owner of the Premises, granting it possession and for past due rent (A282-288).

Thereafter the Suffolk County Action was intensively litigated. Each side engaged in extensive discovery of the other. A judicial hearing officer was appointed *at Ulysses' request* to supervise discovery and preside over the depositions (A214). At last, Ulysses moved for summary judgment and Feldstein cross moved for summary judgment (A179-188). Both sides submitted voluminous affidavits, exhibits, depositions and memoranda of law (A214). Indeed, the Suffolk County Decision states there were 47 separate documents submitted to that Court (App. J at J2). Ulysses' full and fair opportunity to litigate in the Suffolk County Court is obvious from the record and it, in fact, made ample use of that opportunity to extensively litigate the action and, particularly, the summary judgment motions. Any further question on that score was answered when, at the oral argument leading up to the Eastern District dismissal, counsel for Ulysses could provide no answer to Judge Hurley's questions about *how* Ulysses was deprived of an opportunity to be fully heard in the Suffolk County Action (App. G at G4-G8).

Eventually, Justice Gerard D'Emilio rendered a decision on January 31, 2000 (App. J) granting Feldstein's cross-motion for summary judgment, denying Ulysses' motion for summary judgment and holding that Feldstein "has demonstrated his entitlement to the remedy of specific performance" (App. J8).

That determination was unanimously affirmed by the New York Appellate Division, Second Department on October 10, 2000. Ulysses then served and filed a meritless notice of appeal to the New York Court of Appeals, boldly asserting that the action "directly involved the construction of the Due Process Clauses in the United States Constitution and the Constitution of the State of New York." Ulysses' defense of that notice paralleled its assertions at 9-10 of the Petition. The New York Court of Appeals on December 21, 2000 vacated the notice, with $500 costs, on the ground "that no substantial constitutional question is directly involved." Thereafter, the Appellate Division and the New York Court of Appeals each denied successive motions for *leave* to *appeal* to the New York Court of Appeals, indicating that the case was not a matter of statewide importance. Thus, Feldstein's right to specific performance has been fully affirmed through the entire New York court system.

B. The Dismissed Complaint

Ulysses initially instituted the present action only against Feldstein, Morton and Gibbs (A263-A281). On April 6, 2000, it served and filed an amended complaint (the "Amended Complaint") (A12-44). The Amended Complaint differs from the original complaint in a number of major ways:

1. It discloses the existence of the Suffolk County Decision and the Judgment entered pursuant to it (A32, 179-189) and annexes them. Moreover, "Count Two" seeks the specifically forbidden relief of a declaration from the District Court "that all determinations in respect of ownership, access to and control over the Premises shall henceforth be made by this Court and the Federal Government and not by the

State and Local Government Defendants" (A41). Ulysses made this prayer for relief even though its Amended Complaint acknowledges that the judgment of Supreme Court, Suffolk County determining title to the Premises had been appealed by it to the Appellate Division, Second Department, and a stay had been ordered pending appeal (A14, 35). In other words, simultaneously with its attempt to have a federal court review the merits of a state court judgment, it proceeded with its appeal from that judgment in the state court system. Thus, the object of the Amended Complaint is to have a federal court review the actions of a state court. To paraphrase *Homola v. McNamara*, 59 F.3d 647, 650 (7th Cir. 1995), Ulysses went from ignoring the Suffolk County Decision in the Original Complaint to attempting to upset it in the Amended Complaint. As will be discussed later, this deprives the district court of subject matter jurisdiction.

2. It joined as added defendants, the State of New York (subsequently voluntarily dismissed), Suffolk County, the Incorporated Village of East Hampton and Edward P. Romaine, in his capacity as the Clerk of Suffolk County. Thus, these governmental entities have been made parties in a dispute between private parties over land ownership.

3. It changes the basis of the district court's jurisdiction from diversity to 42 U.S.C. § 1983 by alleging a federal civil rights claim, as well as pendent state law claims. As Judge Hurley and the Second Circuit held, the alleged substantive underpinnings for such concocted civil rights claim violate a number of well established rules governing such actions. The supposed unconstitutional acts of the municipal defendants include:

(a) The County Clerk's delay of approximately three weeks in filing Ulysses' deed by reason of that deed's illegibility (A23);

(b) The County Clerk's alleged wrongful filing of Feldstein's notice of pendency (*lis pendens*) based on his Suffolk County Action (A23-24),

(c) The East Hampton Police Department's alleged violation of Ulysses' rights by barring its representatives from entering upon the Premises as trespassers (A30);

(d) Justice D'Emilio's decision was allegedly so wrong in its factual determinations and legal conclusions about New York law that it deprived Ulysses of due process (A32-34); and

(e) The judgment in the Suffolk County Action was allegedly entered "improperly" (A34).

Surprisingly, in the Petition seeking this Court's review of a determination that a complaint does not state a claim, Ulysses barely mentions that complaint. This failure is particularly inexplicable in light of Judge Hurley's specific discussion of the complaint in his decision (App. G at G17-G21). The Petition is especially scanty in its description of the last seven counts of the Amended Complaint; those alleged against the three individual defendants, Morton, Feldstein and Gibbs, as opposed to the various municipal defendants. In fact, the Petition merely summarizes these claims in a single sentence (at p. 11). All of these last seven counts rest upon Ulysses' contention that it, not Feldstein, is the rightful owner of the Premises, which contention was expressly rejected by the central finding of the Suffolk County Decision, subsequently affirmed throughout the New York State court system. These seven counts are:

1. Count Three alleges intentional interference with Ulysses' quiet possession and enjoyment of the Premises (A36-37). Since Ulysses has been held to have no right whatsoever to the Premises, it follows that it has no right to quiet possession and enjoyment.

2. Count Four alleges a conspiracy to interfere with the purported contract of sale between Ulysses and Rounick and the purported deed from Rounick to Ulysses pursuant to that contract (A37). Since the state courts have found that contract and deed to be in violation of Feldstein's rights, that claim must also fail.

3. Count Five alleges that Feldstein obtained rent from Morton on the Premises. Hence, it reasons that he "converted" that money (A38). Of course, this count is predicated on Ulysses' being the owner of the Premises, which the state courts have held it is not.

4. Count Six alleges conversion of the personal property of Rounick, the prior owner of the Premises (A38-39). This subject was specifically dealt with by the Suffolk County Decision, which gave Rounick the right to remove his personal property at the time of the court-ordered deeding of the Premises to Feldstein (App. J at J6-J7). Ulysses' new and unsubstantiated allegations that such personal property was assigned to Ulysses cannot change the fact that this claim has been adjudicated in state court.

5. Count Seven is for slander of title, but without legal title to the Premises, there is no title to slander (A39-40).

6. Count Eight seeks an injunction directing defendants to relinquish the Premises, as well as Rounick's personal

property, to Ulysses (A40). This is, of course, the exact opposite of the relief ordered by the state courts. Such relief had been requested by Ulysses in its counterclaims in the Suffolk County Action and in its motion for summary judgment and was specifically denied by the state courts.

7. Finally, Count Nine seeks a declaratory judgment that Ulysses is the rightful owner of the Premises (A41). However, there is now a final state court determination declaring that Feldstein is the rightful owner of the Premises.

C. The Prior Proceedings

Shortly after amending its complaint, Ulysses moved for preliminary injunctive relief by order to show cause (A2). Morton and Feldstein cross-moved to dismiss the complaint based on the *Rooker-Feldman* doctrine and the doctrines of *res judicata* and collateral estoppel (A205-405). At the oral argument on May 12, 2000 (A406-450), while putting off the determination of the dismissal motions for further consideration, Judge Hurley denied Ulysses' injunction motion upon the grounds that, in the light of the Suffolk County Decision and the *res judicata* effect which had to be given it, Ulysses had not shown the necessary likelihood of success (A440-446). Making that determination even more cogent is Judge Hurley's specific *assumption* for the purposes of that decision that he had subject matter jurisdiction (A425). Thus, he found no likelihood of success prior to even considering the critical issue of subject matter jurisdiction, which he and the Second Circuit subsequently decided against Ulysses. At that point, Ulysses' persistence in maintaining this action became frivolous. *See Kahne-Richards Family Foundation v. Village of Baldwinsville*, 953 F. Supp. 39 (N.D.N.Y. 1997), *affirmed without opinion*,

141 F.3d 1151 (2d Cir. 1998). That case awarded sanctions under Rule 11, F.R.C.P. for persisting in a litigation after the District Court denied a provisional remedy because of the preclusive effect of a prior state court judgment.

Ulysses submitted a memorandum of law on the Individual Defendants' motions to dismiss (as well as on those of the municipal defendants) wherein it made two arguments with respect to those motions: (1) that it was denied a fair and full opportunity to litigate in the Suffolk County Action; and (2) essentially the same argument it advanced in the Second Circuit and in its Petition as to its constitutional rights as a "title holder" before the Suffolk County Decision. Not surprisingly, it has not made its "full and fair opportunity to litigate" argument to either the Second Circuit or this Court since it was unable to explain how, in answer to the questions of Judge Hurley at oral argument, it was denied such an opportunity in the Suffolk County Action (App. G at G4-G8).

As indicated, on August 1, 2000, Judge Hurley, following a detailed analysis of the complaint (App. G at G17-G21), dismissed the complaint against the Individual Defendants after oral argument of the dismissal motions (App. G) for both lack of subject matter jurisdiction pursuant to the *Rooker-Feldman* doctrine (App. G at G2 1-26) and for failure to state a claim by reason of *res judicata* and collateral estoppel (App. G at G26-G27). He also dismissed the complaint against the municipal defendants for failure to state a claim under 42 U.S.C. § 1983 (App. G at G27-G33).

Judge Hurley's dismissal was unanimously affirmed by the Second Circuit in a summary order dated April 18, 2001 (App. A). Significantly, while Ulysses is trying to convince this Court to favor its Petition over the mountain of other

certiorari petitions before it because the case supposedly presents issues of sufficient nationwide importance that it merits this Court's attention, the Second Circuit believed "that no jurisprudential purpose would be served by a written opinion" which could be cited in unrelated cases (2d Cir. Local Rule § 0.23). The Second Circuit agreed that the case against the individual defendants "is plainly prohibited by *Rooker-Feldman*" and that the allegations "concerning the municipal defendants fail to state a claim under § 1983 because they allege no municipal practice or policy" (App. A at A3).

D. Ulysses' Other Actions

Before advancing to the argument section, we need first refer to the prior and subsequent actions brought by Ulysses on these same issues, as well as the parallel conduct of its principal, Sheldon Solow.

Ulysses' conduct throughout the dispute about the Premises manifests its penchant for litigating without regard for the law, the facts or even the prior court determinations. This action is one of seven in which Ulysses has trotted out its now rejected contentions of law and fact. The first is, of course, the Suffolk County Action in which, as indicated, it asserted counterclaims (A290-335). Then it brought a summary proceeding in the Village Court, East Hampton, to recover possession of the Premises from Feldstein in a summary proceeding of such little merit it withdrew it after Feldstein served opposing papers (A215, 336-339). Then, it brought an earlier action in the Eastern District against Morton, but not Feldstein (A340-350). Ultimately, that action was dismissed for failure to join Feldstein, who was held to be an indispensable party (A351-371). Later, Ulysses brought

an action in Supreme Court, *New York* County (Manhattan), seeking discovery from a company, one of whose officers had submitted a factual affidavit in connection with the Suffolk County motions (A491-495), which was dismissed off the bench by that court.

Ulysses and another of Sheldon Solow's corporate shells unsuccessfully tried yet again to block specific performance via the United States Bankruptcy Court for the Southern District of *Florida* in the context of a bankruptcy proceeding involving a corporation with which Feldstein was affiliated. Finally, Ulysses has filed (but not yet served) an action against Morton and Feldstein and their lawyers personally, as well as Gibbs, the Clerk of Suffolk County, members of the East Hampton police force and others under the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. § 1961, *et seq.* in the United States District Court for the *Southern* District of New York, even though the Eastern District has territorial jurisdiction of the Premises and has been the venue of two prior actions. It also filed a notice of pendency (*lis pendens*) with the Clerk of Suffolk County based on this Eastern District action *after* the Eastern District Action had been dismissed by Judge Hurley.

Ulysses' multiple litigations and its disregard for the principles of *res judicata* and collateral estoppel are characteristic of its principal, Sheldon Solow.[4]

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4. *See e.g.*, *Morgan Guaranty Trust Co. v. Solow*, 114 A.D.2d 818, 495 N.Y.S.2d 674 (1st Dept. 1985), *affirmed summarily*, 68 N.Y.2d 779, 506 N.Y.S.2d 674 (1986); *Avon Products, Inc. v. Solow*, 215 A.D.2d 247,626 N.Y.S.2d 493 (1st Dept. 1995), *ibid.* 270 A.D.2d 122,704 N.Y.S.2d 255 (1st Dept. 2000); *Solow v. Liebman*, 253 A.D.2d 808, 677 N.Y.S.2d 622 (2d Dept. 1998), *ibid.* 262 A.D.2d 693, 692 N.Y.S.2d 693 (2d Dept. 1999).

SUMMARY OF ARGUMENT

Since Ulysses' claims against the individual defendants all involve title to the Premises and hence call for reversal of the state court determination, they are barred by *Rooker-Feldman*. This is manifested by the attack on the legal and factual merits of the state court determination in Ulysses' complaint and even in the Petition. In any event, there are adequate state grounds — *res judicata* and collateral estoppel — for the dismissal at issue.

Ulysses' claim of a constitutional right to the Premises is irrelevant to its state law claims against the Individual Defendants since the state law claims are meritless, as established by the contracts here and Ulysses' long history of failure to be put into interim possession through the courts. The constitutional claims have even less merit when examined individually and, in reality, what Ulysses is asserting is a constitutional right to trespass, while its claims concerning the Suffolk County Clerk's handling of land records could not withstand Judge Hurley's questions to its counsel

REASONS FOR DENYING THE WRIT

I.

THE DISTRICT COURT LACKED JURISDICTION UNDER THE *ROOKER-FELDMAN* DOCTRINE

All that need be said about the *Rooker-Feldman* doctrine was said by the Second Circuit in its summary order:

> Under the so-called *Rooker-Feldman* doctrine, because only the United States Supreme Court can

> entertain an appeal to reverse or modify a state court decision, if a plaintiff's claims are "inextricably intertwined" with a state court's determinations, a federal district court is without jurisdiction to hear those claims. *See Moccio v. New York State Office of Court Admin.*, 95 F.3d 195, 198 (2d Cir. 1996) (citing *Rooker v. Fidelity Trust Co.*, 263 U.S 413, 415-16 (1923) and *Feldman v. District of Columbia Court of Appeals*, 460 U.S. 462 482-84 n.16 (1983)). We affirm the district court's conclusion that Ulysses' claims *against the individual defendants* are barred under the *Rooker-Feldman* doctrine, because these claims all require, at least in part, a determination that Ulysses has property rights in the premises at issue. As such, an adjudication of these claims would necessitate review of Justice D'Emilio's decision, which is plainly prohibited by *Rooker-Feldman*. (Emphasis added.) (App. A at A3)

The Second Circuit was careful to limit its statement to "Ulysses' claims against the individual defendants." In contrast, Point I of the Petition does not even discuss the claims against the Individual Defendants. This parallels Ulysses' posture before the Second Circuit. In its reply brief there, it did not even mention either the claims against the Individual Defendants or *Rooker-Feldman*. Instead, it devoted its attention to the claims against the municipal defendants and even there largely to an irrelevant tirade about press reports of allegations of misbehavior by the Suffolk County Police towards female motorists. Now Ulysses has the audacity to seek certiorari to reverse a ruling Ulysses has not deigned to even argue to this Court or the Court of Appeals.

The best proof of the applicability of *Rooker-Feldman* is the prayer for relief in Ulysses' complaint under its second count, which seeks a judgment "declaring that all determinations in respect of ownership, access to and control over the Premises shall henceforth be made by this Court and the Federal Government and not by the State and Local Government Defendants" (A41). That demand is so frivolous that it would be improper if what were involved was a still undecided state court case under *Younger v. Harris*, 401 U.S. 37 (1971) and its application to state civil actions under such cases as *Juidice v. Wall*, 430 U.S. 321 (1977); *Trainor v. Harris*, 431 U.S. 434 (1977) and *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987). Such demand is even more improper after the state court action has gone to judgment and thus must fall under *Rooker-Feldman*.

An examination of Section E of the Ulysses amended complaint (A32-34) establishes that what Ulysses sought was a reversal of the subsequently affirmed Suffolk County Decision. That section rehashes Ulysses' now familiar contentions about the facts and New York State law and contends that Justice D'Emilio's failure to agree with them constitutes a deprivation of due process. Under *Rooker-Feldman*, the district court lacked jurisdiction to hear such a claim.

The Petition follows Ulysses' familiar pattern in the federal courts: an attack on the actions of the state courts. The Petition is at war with itself. With one voice, it contends that *Rooker-Feldman* does not apply, and in another and more pervasive one repeatedly asserts that the New York State courts were wrong. Thus, it says that the affirmed state court determination was "albeit erroneous" (at p. 2). In its Statement of Facts, Ulysses drags out a number of its

contentions relative to New York law and the underlying facts which it had previously made unsuccessfully to the New York courts, to wit:

(1) Feldstein allegedly informed Rounick he was having financial difficulties (at p. 3).

(2) Feldstein purported to assign his rights and obligations to Morton (at p. 4).

(3) Feldstein allegedly wrongfully changed the terms of his contract with Rounick (at pp. 4-5).

(4) Rounick allegedly "reasonably and rightfully determined" that Feldstein "renounced his contract and forfeited his rights under it" (at pp. 5-6).

(5) Feldstein allegedly breached his contract with Rounick by failing to pay the taxes on the Premises or the moneys supposedly still due Rounick or Ulysses under it (at p. 6).

(6) Feldstein, Morton and Gibbs allegedly conspired to destroy or damage the Premises (at pp. 7-8).

(7) Feldstein was allegedly not ready, willing and able to close title (at p. 9).

(8) The procedure in entering the judgment was allegedly improper (at pp. 9-10).

At p. 10 of its Petition, Ulysses asserts that the Second Department affirmed the Suffolk County judgment "Notwithstanding all of these grievous errors of law and

irregularities in the Judgment itself." Thus, Ulysses is asking this Court to ignore *Rooker-Feldman* and accept the same arguments the New York courts have already rejected.

In this, Ulysses is reverting to the pattern it employed when the earlier Eastern District action against Morton alone and the Suffolk County Action were both pending. In those actions, Ulysses repeatedly tried to take two bites of every apple. Thus, it sought discovery from the Eastern District that had been previously denied by the state court and injunctive relief from the state court that had been repeatedly denied by the Eastern District (A218-219). Such injunction was stayed by the Appellate Division, Second Department before being mooted by the Decision on the merits. Of course, Ulysses is now trying to achieve the ultimate in double dipping: review of a state trial court judgment by a federal district court after it had been affirmed by the state appellate courts.

Rooker-Feldman is a recognition that relitigating in federal court a dispute already adjudicated in state court is improper. This case presents a text book example of the wisdom of that doctrine.

As Judge Hurley recognized in his denial of a preliminary injunction, even in the absence of the *Rooker-Feldman* doctrine, the claims asserted by Ulysses against the individual defendants would still be barred. In the first place, they are barred by 28 U.S.C. § 1738, which mandates that judicial proceedings of any court of any State "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State." As this Court said in *Migra v. Warren City School District*, 465 U.S. 75 (1984). "It is now well settled that a

federal court must give to a state court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered" (at p. 81). *Migra* went on to dismiss a § 1983 claim in a federal case after an unsuccessful state court litigation in which there was no allegation of a § 1983 claim, stating:

> That statute embodies the view that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims. This reflects a variety of concerns, including notions of comity, the need to prevent vexatious litigation, and a desire to conserve judicial resources.

Other decisions of this Court, *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 344 (1981), as well as those of both the Second Circuit applying New York law, *Flaherty v. Lang*, 199 F.3d 615 (1999); *Norris v. Grosvenor Marketing, Ltd.*, 803 F.2d 1281(1986); and the New York Court of Appeals, *Yonkers Contracting Co. v. Port Authority*, 93 N.Y.2d 375, 640 N.Y.S.2d 512 (1999); *Reily v. Reid*, 45 N.Y.2d 24, 407 N.Y.S.2d 645 (1978), rigorously forbid litigating claims (*res judicata*) and issues (collateral estoppel) which were litigated or could have been litigated in suits where, as here, the plaintiff in the new action had a full and fair opportunity to contest the previous litigation.

As demonstrated in a claim by claim analysis of the Amended Complaint, *supra* at pp. 7-8, each and every claim alleged against Morton, Feldstein and Gibbs has been decided against Ulysses by the New York courts, particularly the key issue of entitlement to the Premises. Thus, even were the district court to have jurisdiction over this action, the

Amended Complaint would still fall under New York law as a result of its doctrines of *res judicata* and collateral estoppel. Thus, the decision Ulysses seeks to reverse rests upon both the federal ground of *Rooker-Feldman* and the state ground of *res judicata* and collateral estoppel.

II.

ULYSSES HAS NOT ALLEGED A § 1983 CLAIM

Ulysses' principal argument indeed its only argument other than rehashing the contentions rejected by the New York Courts, is that the various municipal defendants unconstitutionally interfered with its "rights" to the Premises in the period between its purported acquisition of title and the Suffolk County Supreme Court's decision. Ulysses has not alleged these claims against the Individual Defendants, hence this argument does not even pertain to their motions.

Moreover, Ulysses contends that even though its deed to the Premises was held by the state court determination to be invalid and its acquisition of such title was suspect, it nevertheless had ownership rights entitled to constitutional protection prior to that determination. This argument is specious, since Ulysses took title *expressly subject to* Feldstein's right of occupancy. Its contract with Rounick, the purported seller, and its accompanying purchase money mortgage specify Ulysses' rights are subject to Feldstein's rights (A83, 94). Moreover, pursuant to Rounick's earlier contract with Feldstein, Feldstein is expressly given the exclusive right "to use and enjoy the property" (A44).

Ulysses' claim of right to possession is further belied by its universally unsuccessful, repeated attempts in both of its Eastern District actions, in the Suffolk County Court and subsequently in the Second Department, to obtain occupancy by serial preliminary injunction motions (A220).

Additional evidence of the meritless nature of Ulysses' claim of some rights in the Premises while the rights of the parties were *sub judice* in Suffolk County is its abandonment of its action to acquire possession in the Village Court of East Hampton upon being served with opposition papers (A215, 336-339). In light of Ulysses' penchant for persisting in litigation whether or not the litigation has any validity, a law suit abandoned by Ulysses after it receives opposing papers must have been meritless indeed.

Moreover, the multiple judicial rejections of Ulysses' claim to possession undercut Ulysses' contention that a failure to reverse "invites chaos" (at p. 18). Ulysses applied unsuccessfully to four different courts, three state and one federal, in its effort to get possession. Thus, its failure to obtain possession is the result of consistent court decisions and not some purportedly unconstitutional actions by the local governments.

The speciousness of Ulysses' claims becomes even more apparent when they are examined one by one. The most outrageous is the claim that its constitutional rights were violated by the East Hampton police barring Ulysses' representatives entering from the Premises. In other words, Ulysses contends that the Constitution affords it the right to trespass on property lawfully in possession of another and that its rights were infringed because the local police did not unilaterally give to Ulysses the possession of the

Premises that the courts refused to grant.[5] Rather than being unconstitutional violations of Ulysses' rights, the performance of their duty by East Hampton police prevented further harassment of the lawful occupants of the Premises by Ulysses.

As with Ulysses' assertion that it did not have a full and fair opportunity to litigate, its contention that the County Clerk's treatment of its deed[6] and Feldstein's notice of pendency violated its constitutional rights did not survive Judge Hurley's questions to Ulysses' counsel at the oral argument of the dismissal motions about how Ulysses was damaged (App. G at G13-G14). As Judge Hurley pointed out, these actions in no way harmed Ulysses. This is particularly so since Ulysses' own contract with Rounick evidenced its awareness of Feldstein's rights and even specifically made Ulysses subject to Feldstein's rights Moreover, as held in *Brown v. Bethlehem Terrace Associates*, 136 A.D.2d 222, 525 N.Y.S.2d 978 (3d Dept. 1988) and *35-45 May Associates v. Mayloc Associates*, 162 A.D.2d 389, 557 N.Y.S.2d 41 (1st Dept. 1990), under New York law a notice of pendency is an undeniable true statement of the existence of an action for specific performance.

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5. The absurdity of this contention is compounded by Ulysses' track record of flying helicopters over the Premises, attempting to cut off or interfere with the electrical power to the Premises and otherwise harassing its occupants. This behavior was enjoined by the Second Department pending appeal on August 24, 2000.

6. Ulysses' unhappiness with the County Clerk's requirement of a *legible* deed for recording purposes shows ignorance of New York's Civil Practice Law and Rules 8019(b) *mandating* the use of legible documents for filing by the County Clerk.

CONCLUSION

For all the reasons stated herein, we respectfully submit that the Petition be denied.

Respectfully submitted,

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